SUPREME COURT, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

HIPPOLITO NUNEZ GUTIERREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT VIOLATED MR. NUNEZ GUTIERREZ'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, BY RESTRICTING THE DEFENSE'S CROSS EXAMINATION OF KEY GOVERNMENT WITNESSES ?

II. WHETHER THE DISTRICT COURT VIOLATED MR. NUNEZ GUTIERREZ'S FIFTH AMENDMENT RIGHT TO A FAIR TRIAL BY RESTRICTING THE DIRECT TESTIMONY OF DEFENSE WITNESSES, THEREBY DENYING HIM AN OPPORTUNITY TO PRESENT HIS THEORY OF THE DEFENSE TO THE JURY?

PARTIES TO THE PROCEEDING

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OPINIONS IN THE COURTS BELOW

The opinion of the Court of Appeals affirming the conviction is United States v. Hippolito Nunez Gutierrez, No. 96-50314, an unpublished memorandum decision. The petition for rehearing was denied.

STATEMENT OF JURISDICTION

On August 29, 1997, the Ninth Circuit Court of Appeals entered judgment affirming the conviction in this case. On December 12, 1997, the Ninth Circuit Court of Appeals denied the petition for rehearing and rejected the suggestion for rehearing en banc in this case. This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pursuant to Rule 14(f) of the Supreme Court Rules, the relevant constitutional provisions, statutes and regulations involved are cited here and the pertinent text is set out in the appendix.

Federal Rule of Evidence 403

Federal Rule of Evidence 608

United States Constitution, Fifth Amendment

United States Constitution, Sixth Amendment

STATEMENT OF THE CASE

Petitioner respectfully requests that a writ of certiorari be issued to review the judgment of the Ninth Circuit Court of Appeals, in United States v. Hippolito Nunez Gutierrez, No. 96-0293, which affirmed the petitioner's conviction. The Ninth Circuit Court of Appeals had jurisdiction to review this case pursuant to Title 18 U.S.C. §1294(1).

PROSECUTION CASE

Mr. Nunez Gutierrez first met the government's key witnesses, Leticia Vasquez and Rosalina Mangosing in May of 1994. He was introduced to them by his distant cousin, Celio Nunez.

According to the government's key witness, Ms. Vasquez, in May of 1994, Mr. Nunez Gutierrez paid her to drive a car, a Buick Somerset, to North Carolina. He told her the car was loaded with marijuana. According to Ms. Vasquez, Mr. Nunez Gutierrez gave her directions to North Carolina and a phone number to contact a man named Ruben, when she arrived. She claimed that Mr. Nunez Gutierrez only gave her money for expenses in exchange for her participation.

Ms. Vasquez asked her friend, Rosalina Mangosing to accompany her on this trip without telling her that there were drugs in the car. Ms. Mangosing went on this trip and at some point during the drive Ms. Vasquez informed her that there was marijuana in the car.

Ms. Vasquez and Ms. Mangosing arrived in North Carolina, checked into a hotel, and called Ruben. The next morning Ruben came to the hotel and they all drove to a trailer. Later that day, Ms. Vasquez told Ruben that she and Ms. Mangosing had to get back to California for Ms. Mangosing's graduation and they wouldn't make it in time if they had to take

the car back. Ruben offered to pay for them to fly back if they agreed to come back and get the car. They agreed. They flew into Los Angeles and Celio Nunez picked them up at the airport.

After shopping in Los Angeles, Ms. Vasquez paged Mr. Nunez Gutierrez and he called her back. She told him that she had to go back to North Carolina and get the car. On June 12, 1994, Ms. Vasquez and Ms. Mangosing returned to North Carolina to pick up the car. Ms. Vasquez received more money from Ruben, when she picked up the car.

Ms. Vasquez drove the car to her apartment in California, paged Mr. Nunez Gutierrez and asked him to come get the car. Mr. Nunez Gutierrez picked up the car. Later, he returned the car and left outside of Ms. Vasquez's apartment.

On June 26, 1994, Mr. Nunez Gutierrez called Ms. Vasquez and asked her to meet him in Mexicali with the Buick. Ms. Vasquez and Ms. Mangosing took the car to Mr. Nunez Gutierrez in Mexicali. They arrived at about 11:00 p.m.

The next morning, on June 27, 1994, they contacted Mr. Nunez Gutierrez and he came to their hotel to pick up the car. Later he brought the car back and had breakfast with Ms. Mangosing, Ms. Vasquez and two other companions, Raymundo and Ruben.

Mr. Nunez Gutierrez had the car washed. Then he asked

Ms. Vasquez to drive the car across the border. He told her it had drugs in it and offered to pay her $400. She agreed.

Ms. Vasquez and Ms. Mangosing attempted to cross the border in the Buick. They were immediately taken into custody by Immigration officers.

The two women were separately questioned by U.S. Customs agents. Ms. Vasquez initially told the agents she had been visiting her Aunt in Mexico. The agents searched and seized Ms. Vasquez's purse and they found a hotel receipt showing that she spent the night in a hotel. When confronted with this receipt, Ms. Vasquez told the agent she had stayed in a hotel because her aunt's house was too hot.

A road map of the United States, with Interstate 40 from California to the East Coast highlighted, was found in the Buick. Other receipts for hotels in North Carolina and airline flights from Atlanta, Georgia to Los Angeles were found in the women's belongings.

When the agent asked Ms. Vasquez whose car she was driving, she told him she borrowed it from Leticia Vargas. Ms. Mangosing was being questioned in another room and there were inconsistencies in their stories.

Because of the inconsistencies in their stories, agent Burke confronted them and suggested that one of them was lying. Both

Ms. Vasquez and Ms. Mangosing claimed they did not know there were drugs in the car. However, the agents found 97 pounds of cocaine in a secret compartment under the front seats of the Buick.

Later, on September 30, 1994, Ms. Vasquez implicated Mr. Nunez Gutierrez as her source for the cocaine she transported. Both women agreed to testify as government witnesses against Mr. Nunez Gutierrez. Based on the statements of Ms. Vasquez and Ms. Mangosing, Mr. Nunez Gutierrez was arrested and indicted with four counts of drug related charges.

DEFENSE CASE

The defense's theory of the case is that Ms. Vasquez and Ms. Nunez falsely accused Mr. Nunez Gutierrez of transporting drugs, in order to protect their real accomplice, Ms. Vasquez's lover, Celio Nunez. There is direct evidence in this record which supports this defense theory. Ms. Vasquez called Celio Nunez calle- every time she was transporting drugs. Celio Nunez picked Ms. Vasquez and Ms. Mangosing up from the airport when they returned from the North Carolina smuggling trip. Celio Nunez even owned the car, registered to his ex-girlfriend, which was used by Ms. Vasquez, in an attempt to transport cocaine across the border. Finally, it was Celio Nunez who was the first person Ms. Vasquez contacted when she was arrested.

On March 3, 1995 an indictment was filed in the Southern

District of California. Mr. Nunez Gutierrez was charged with the following: count one, conspiracy to import cocaine in violation of Title 21, U.S.C. §952, §960, and §963; count 2, importation of cocaine in violation of 21 U.S.C. §952 and §960; count 3, conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. §846, §841(a)(1) and count 4, possession of cocaine with intent to distribute in violation of 21 U.S.C. §841(a)(1) and aiding and abetting in violation of 18 U.S.C. §2.

Motions in the case were heard and ruled upon by the Honorable William B. Enright and the Honorable Leland C. Nielsen. Mr. Nunez Gutierrez was tried before a jury on this case before the Honorable Leland C. Nielsen. On November 30, 1995, the jury convicted Mr. Nunez Gutierrez on all counts.

On May 28, 1996, a motion for a new trial was denied by the Honorable Leland C. Nielsen.

On May 28, 1996, Mr. Nunez Gutierrez was sentenced to seventeen and one half years in a custody.

Mr. Nunez Gutierrez appealed his conviction on December 10, 1996, and the Ninth Circuit Court of Appeals affirmed his conviction on August 29, 1997. On December 12, 1997 the Ninth Circuit Court of Appeals denied Mr. Nunez Gutierrez' petition for rehearing and suggestion for rehearing *en banc.*

REASONS FOR ALLOWANCE OF THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE DISTRICT COURT VIOLATED MR. NUNEZ GUTIERREZ'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, BY RESTRICTING THE DEFENSE'S CROSS EXAMINATION OF KEY GOVERNMENT WITNESSES

The constitutional right of an accused in criminal proceeding to be confronted with the witnesses against him is secured for all defendants in state as well as federal proceedings. This right means more than being able to confront witnesses physically and a primary interest secured by it is the right of cross-examination. U.S.C.A. Const. Amend. 6, Davis v. Alaska, 415 U.S. 308, 309, 94 S.Ct. 1105, 1106, 39 L.Ed.2nd 347,348 (1974).

This Court considers this right to be of paramount importance as it stated in Pointer v. State of Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 1068 (1965). "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

"It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the

court what facts a reasonable cross-examination might develop. Prejudice ensues from denial of the opportunity to place the witness in his proper setting and to put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. To say that prejudice can be established only by showing that the cross-examination if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." Smith v. Illinois 390 U.S. 129, 131, 88 S.Ct. 748, 750 (1968).

The standard, suggested by the Supreme Court and adopted by the Ninth Circuit, for determining whether a restriction on cross-examination violates the Confrontation Clause, is as follows:

> [A] criminal defendant states a violation of the confrontation clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors.. could appropriately draw inferences relating to the reliability of the witness." U.S. v. Vargas, 933 F.2d 701, 702 (9th Cir. 1991) citing Van Arsdall at 680.

In addition, defense counsel must be given maximum opportunity to test the credibility of the government's key witness.

United States v. Brady, 561 F.2d 1319, 1320 (9th Cir. 1977) citing United States v. Harris, 501 F.2d 1 (9th Cir. 1974). "Such wide latitude in cross-examination is especially appropriate when the key witness is an accomplice of the accused" Burr v. Sullivan, 618 F.2d 583 (9th Cir. 1980) citing Gordon v. United States, 344 U.S. 414; 73 S.Ct. 369; 97 L.Ed. 447 (1953); United States v. Bagsby, 489 F.2d 725, 727 (9th Cir. 1974) (per curium); United States v. Rodriguez, 439 F. 2d 782, 783 (9th Cir. 1971) (per curium); Thurman v. United States, 316 F.2d 205, 206 (9th Cir. 1963). Even though the scope and extent of cross-examination are within the discretion of the trial court, "... the trial judge's discretion cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." United States v. Reindeau, 947 F.2d 32, 35 (2nd Cir. 1991) citing, United States v. Pedroza, 750 F.2d 187, 195-196 (2nd Cir. 1984) quoting, Gordon v United States, 344 U.S. 414, 423, 73 S.Ct. 369, 375, 97 L.Ed. 447 (1953).

In Brady, defense counsel was not permitted to cross-examine the government's key witness about the name of her prior source for narcotics. The judge ruled that this information was irrelevant. However, the Ninth Circuit found that this was improper restriction of cross-examination because identification of the witness's prior source was relevant not only to impeach her prior testimony but also because it lent some support to the defense

theory that the witness had implicated the defendant to protect herself from her real source and to seek immunity for herself and her son. U.S. v. Brady, 561 F.2d 1319, 1320 (9th Cir. 1977).

MS. VASQUEZ

Similarly, in the instant case, the prosecution's entire case rested primarily on the testimony of one witness, Leticia Vasquez, and secondarily on the supplemental testimony of Ms. Mangosing. There was no other direct evidence which linked the defendant to the crime. As in Brady, defense counsel was not allowed to cross-examine the government's star witness, Ms. Vasquez, about her previous connections to drug-trafficking organizations through her association with her boyfriend, Celio Nunez and her association with David Cardenas. This testimony would have been relevant to show Ms. Vasquez's contact with individuals who smuggled drugs during the time period that the alleged drug smuggling in this case occurred.

The Court denied an extremely important area of defense inquiry of Ms. Vasquez on cross, which would have exposed to the jury that her boyfriend Celio Nunez was in custody for drug trafficking. This was relevant to impeach Ms. Vasquez's earlier statements to Customs Agents that Mr. Celio Nunez was not involved with this activity and to show the jury that it was likely that Ms. Vasquez was actually smuggling drugs for Mr. Celio

Nunez rather than for the defendant. It would further have provided evidentiary support for defendant Nunez Gutierrez's claim that Ms. Vasquez was falsely implicating him to protect her lover, Celio Nunez. This was crucial impeachment testimony, which the court kept out of evidence, by denying defense cross examination. This evidence went directly to the heart of the defense that Ms. Vasquez was actually protecting her true source, Celio Nunez, by falsely accusing the defendant.

The link between the information, which would have been elicited through cross-examination, and the defense's theory of the case is even more direct in this case than in Brady. This is because Ms. Vasquez had a personal relationship to Celio Nunez and there is direct evidence in this case which points to Celio Nunez as the real perpetrator of this drug trafficking scheme. It was Celio Nunez, whom Ms. Vasquez called every time she was transporting drugs. It was Celio Nunez who picked Ms. Vasquez and Ms. Mangosing up from the airport when they returned from the North Carolina Drug smuggling trip. It was Celio Nunez who owned the car, registered to his ex-girlfriend, which was used by Ms. Vasquez, in an attempt to transport cocaine across the border. Finally, it was Celio Nunez who was the first person Ms. Vasquez contacted when she was arrested. All of this direct evidence implicating Celio Nunez gives support to the defense theory that

Ms. Vasquez was merely protecting Celio Nunez from prosecution by falsely implicating Mr. Nunez Gutierrez. Therefore, the testimony which would have been elicited that Celio Nunez was involved in drug trafficking, was highly relevant and its exclusion was extremely prejudicial. This testimony, combined with all the direct evidence linking Celio Nunez to this crime would have influenced the jury to doubt Ms. Vasquez's veracity. As she was the main witness against Mr. Nunez Gutierrez and she provided the only direct link between him and the drugs, her impeachment was crucial; it went to the heart of Mr. Nunez Gutierrez's defense.

This is analogous to United States v. Uramoto, 638 F.2d 84, 87 (9th Cir. 1980) in which the Court found that restriction of cross-examination that could have colored the jury's perception of the key witness's credibility and which went to the heart of the defense, was a violation of the confrontation clause. Therefore, exclusion of this information which would have cast doubt on the key witness's credibility was a violation of the Confrontation Clause.

Another area of inquiry on cross-examination of Ms. Vasquez would have shown that she had connections to a drug trafficking organization through her association with David Cardenas. This information was relevant to impeach Ms. Vasquez's credibility. More specifically, Ms. Vasquez had written

Mr. Cardenas' address on the directions for her first drug smuggling trip and she had called him during this trip. In addition, Ms. Vasquez had contact with Mr. Cardenas during a time period when he was involved in drug trafficking and he was later convicted of drug trafficking. As defense counsel explained in her proffer to the court, this evidence was relevant to show why Ms. Vasquez took the trip to North Carolina and to show her connections to a drug trafficking organization, which had no relationship to the defendant in this case. This cross examination would have elicited powerful impeachment evidence and would have demonstrated to the jury that it was likely that the defendant was not involved in drug trafficking and that someone other than the defendant was responsible for the drug trafficking charges in this case. This cross-examination would have provided direct support for the heart of Mr. Nunez Gutierrez's defense.

Additionally, using the standard established in Vargas, the denial of this cross-examination is a clear violation of the Confrontation Clause because the cross-examination defense counsel was denied was appropriate cross, designed to show a prototypical form of bias on the part of the witness. Vargas at 702. If defense counsel had been permitted to pursue this line of cross-examination, it would have exposed the jury to facts from which they could have drawn inferences that Ms. Vasquez was lying. In

fact, it would have shown that Ms. Vasquez was lying to protect her true source for narcotics either Celio Nunez, David Cardenas, or both or that she was lying to protect herself from the wrath of this real source. Therefore, this restriction of cross violated Mr. Nunez Gutierrez's Sixth Amendment right to confront the star witnesses against him.

Another area of defense cross examination which was curtailed by the Court could have elicited testimony that Ms. Vasquez had been fired from a bank for stealing money. This area of inquiry was obviously relevant to impeach Ms. Vasquez's credibility by showing she engaged in dishonest behavior. This evidence was admissible as impeachment evidence under Federal Rule of Evidence §608(b).

Finally the court arbitrarily restricted defense counsel's cross to three more minutes when it was obvious that more time was needed to impeach Ms. Vasquez. As defense counsel was trying to elicit testimony about how Ms. Vasquez had lied to a previous employer by falsely stating that her reason for quitting was to go visit a sick uncle in North Carolina, the court ended the cross examination. The Court even refused defense counsel an additional ten minutes of cross examination after defense counsel's proffer of the remaining relevant areas of inquiry. Defense counsel attempted to persuade the Court of the necessity of allowing her more time to

cross examine Ms. Vasquez, but the Court denied her request, ruling that the proffered cross-examination was excludable under Federal Rule of Evidence Rule 403 as undue delay. Defense counsel was only requesting an additional ten minutes to cross-examine the key government witness. In a trial with only four days of testimony, defense counsel's cross-examination of this key government witness only consumed a few hours and the additional ten minutes of time she requested would not have been an undue waste of time. Clearly, the Court abused its discretion in not permitting defense counsel the additional ten minutes.

Defense counsel proffered to the Court that the additional ten minutes was necessary to elicit testimony from Ms. Vasquez which would impeach her credibility. According to defense counsel's proffer, Ms. Vasquez had $1600 cash on her when she was arrested and she told the government this was to buy furniture; she had told her probation officer that this cash was from her job. In addition, defense counsel wanted to put into evidence that Ms. Vasquez had receipts for over $5000 worth of purchases on her person when she was arrested. Defense counsel was attempting to show the jury that Ms. Vasquez was lying because the $1600 cash and the $5000 worth of purchases could not have possibly come from her job. She was only paid $2000 between January 1994 and June 1994 when she quit her job.

However, the Court denied defense counsel's proffer and cross-examination was terminated. The court cited Federal Rule of Evidence 403 as its basis for curtailing cross-examination. However, a Rule of Evidence cannot be upheld if it violates the Confrontation Clause. For example, in Davis, the state statute which excluded juvenile records from exposure in court was outweighed by the defendant's Sixth amendment right. The Supreme Court stated: "The state's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." Davis at 1112. In addition, "a violation of the confrontation clause could occur, however, even though the proposed area of inquiry burdens the efficient conduct of the trial, if the cross-examination could reasonably be expected to have a substantial effect on the decision of the jury." Hughs v. Raines, 641 F.2d 790, 793 (9th Cir. 1981).

In the instant case, the proposed area of inquiry was relevant to impeach the credibility of the government's key witness. The testimony which would have resulted from this cross-examination could reasonably have been expected to have had a substantial effect on the jury's decision. In effect, it would have given the jury serious reason to doubt the veracity of the testimony of the star witness who provided a direct link between Mr. Nunez

Gutierrez and the drug trafficking crime. Thus, the restrictions on cross-examination violated the Confrontation Clause.

All of the potential cross examination which was denied by the court was relevant to impeach Ms. Vasquez's credibility. This cross was so crucial because Ms. Vasquez's credibility was the government's entire case as defense counsel pointed out to the court.

"The partiality of a witness is subject to exploration at trial and is always relevant as discrediting the witness and affecting the weight of testimony." Davis v. Alaska, 415 U.S. 308, 39 L.Ed.2d 347, 348, 94 S.Ct. 1105 (1974). Cross-examination is the principal means by which believability of a witness and the truth of his testimony are tested. Id at 354.

In Davis, the trial court had restricted the defense's cross-examination of a crucial government witness, Mr. Green, by refusing to allow an inquiry into the witness' probation status as a juvenile delinquent. Id at 349. The defense theory of the case was that Mr. Green may have falsely accused the defendant to protect himself from being implicated in the crimes charged or as a result of undue pressure from the police to identify someone or have his probation revoked. Id at 351. This Court reversed Mr. Davis's conviction finding that the trial court's denial of defense cross-examination of a crucial government witness violated the defendant's Sixth Amendment right to confrontation. Id at 356.

In the instant case, Ms. Vasquez was the government's star witness; her testimony was the key to the government's entire case against Mr. Nunez Gutierrez. All of the areas of inquiry which defense counsel was not allowed to explore on cross-examination were relevant to impeach Ms. Vasquez's credibility by showing her bias and motivation to lie. The trial court's restriction of cross-examination of this crucial witness is analogous to the denial of cross-examination in Davis because it prevented the jurors from hearing the defense theory of the case. As the Court decided in Davis, "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed decision as to the weight to place on ... testimony which provided a crucial link in the ... proof of petitioner's act." Id at 354. In the case at bar, the jury was not allowed to get an accurate impression of the credibility of Ms. Vasquez and because of this the jury could not give sufficient consideration to the defense theory that Ms. Vasquez was falsely implicating the defendant to protect Mr. Celio Nunez. Therefore, this restriction of defense cross-examination violated the defendant's Sixth Amendment right to confront the witnesses against him.

MS. MANGOSING

During cross examination of the only other direct witness against Mr. Nunez Gutierrez, Ms. Mangosing, the court

repeatedly prevented defense counsel from asking questions which were relevant and even cut off defense counsel's cross examination. The court denied defense counsel's cross-examination of Ms. Mangosing's possible drug use, although it is a relevant area of inquiry for a prosecution informant witness.

Defense counsel attempted to pursue this line of cross by questioning the witness about whether her immunization for hepatitis was connected to drug use. However, the Judge denied her cross-examination as follows:

> MS. VON HELMS: Your Honor, it's an indication of controlled substance use, which is an area for cross-examination for a confidential informant.
>
> THE COURT: I'm sorry. You're not to go any further in this regard.
>
> MS. VON HELMS: Are you denying my cross-examination?
>
> THE COURT: I'm denying. [R.T. 212] 1

In addition, the court restricted cross-examination of this witness's ability to recall details of the events leading up to the crime as follows:

> Q. Okay. And did she come by your house repeatedly during that time, or did she just come by the once, and then let you think about it?

---

1 "R.T" refers to the Reporter's Transcript of the Trial.

THE COURT: What difference does it make?

MS. VON HELMS: Your Honor–

THE COURT: I'm sorry, but go to something that matters in this case and stop – doesn't make any difference.

MS. VON HELMS: Your Honor, this witness's ability to recall details about –

THE COURT: I understand, but I'm telling you to proceed to other matters. [R.T. 234]

In the question above, defense counsel was asking Ms. Mangosing how many times Ms. Vasquez came by her house to ask her to go on the North Carolina trip. These questions were relevant to cast doubt on this witnesses credibility as well as her ability to perceive and remember. If Ms. Mangosing could not recall details leading up to the North Carolina trip, the jury could infer that she was merely relating a "story" rather than testifying to actual events. This type of cross-examination could have elicited crucial impeachment evidence which went to the heart of the defense's theory of the case.

Additionally, defense counsel was not allowed to question Ms. Mangosing about Ms. Vasquez's family's disapproval of her boyfriend, Celio Nunez. In fact, after defense counsel's questions on this subject, the court restricted cross- examination to an additional twenty minutes.

Q. When you say somewhat like that, it's because you knew that her parents and her family did not

approve of Cecilio?

MR. PETERSON: Objection. Irrelevant.

THE COURT: What difference does that make in this case? I'll sustain the objection.

Q. Did you – Letti did not let her family know that she lived with him, correct, or tried not to let her family know that she lived with him?

THE COURT: What relevance does that have to this case? none.

MS. VON HELMS: Well, your honor, it does.

THE COURT: I say it doesn't. What I think goes in this courtroom.

MS. VON HELMS: I understand that, your Honor.

THE COURT: Miss Von Helms, you have 20 minutes to finish your cross-examination of this witness, and no more.

MS. VON HELMS: Well your Honor, I need to be able to go through with her exactly what occurred in this case.

THE COURT: I said you have 20 more minutes and that is all.

MS. VON HELMS: I'll hurry, your Honor.

THE COURT: So maybe you should get to something that matters. [R.T. 247-248]

Ms. Vasquez's family's disapproval of Mr. Celio Nunez was relevant to show Mr. Celio Nunez's bad reputation and to impeach the credibility of Ms. Mangosing and Ms. Vasquez by showing their bias and motive to lie as well as by showing Ms. Vasquez's willingness to lie to protect Mr. Nunez.

The Ninth Circuit has "repeatedly held that when the Government's case turns on the credibility of a witness, then defense counsel must be given maximum opportunity to test the credibility of that witness." Burr v. Sullivan, 618 F.2d 583, 587 (9th Cir. 1980) citing, United States v. Brady, 561 F.2d 1319, 1320 (9th Cir. 1970; see United States v. Harris, 501 F.2d 1 (9th Cir. 1974). In the instant case, the government's entire case turned primarily on the credibility of one witness, Ms. Vasquez. There is no other direct evidence linking Mr. Nunez Gutierrez to this crime except Ms. Vasquez's testimony and secondarily, the supplemental testimony of Ms. Mangosing, who however did not directly implicate Mr. Nunez Gutierrez. However, the testimony of Ms. Mangosing was not as persuasive as Ms. Vasquez's testimony because it appeared to be heavily coached and the prosecutor led the witness on many occasions throughout her testimony

Ms. Mangosing's testimony in many minor ways did not corroborate Ms. Vasquez's testimony, although, Ms. Vasquez's testimony was the most damaging to the defendant. The government's conviction of Mr. Nunez Gutierrez rests firmly on the credibility of these two witnesses. There was no other direct evidence linking the defendant to the drugs. In fact, if the testimony of these two witness's was removed, the evidence linking Mr. Celio Nunez to the drug transactions would be far

greater than any evidence against Mr. Nunez Gutierrez. Thus, the defense should have been given the maximum opportunity to test the credibility of these witnesses. However, the defense was not given this opportunity, as the record demonstrates and Mr. Nunez Gutierrez was denied his Sixth Amendment right to confront the witnesses against him.

THIS ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

In addition, Mr. Nunez Gutierrez's conviction should be reversed because this constitutional error was not harmless beyond a reasonable doubt. When the Confrontation Clause is violated by a restriction on the scope of cross examination , the Supreme Court instructs reviewing courts to consider "whether, assuming that the damaging potential of the cross examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Id. at 709 citing Van Arsdall at 684. In determining that this error was not harmless beyond a reasonable doubt the court must look to many factors including " the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall

strength of the prosecution's case." Id.

Applying these factors to the instant case, the court should find that the constitutional violation was not harmless beyond a reasonable doubt. Ms. Vasquez's testimony was crucial. It was not cumulative. There was very little evidence to corroborate her testimony on material points and the extent of cross-examination permitted was minimal. Additionally, the restriction of the cross-examination of Ms. Mangosing was equally prejudicial to the defendant as it was testimony which corroborated Ms. Vasquez's story. The final factor, the overall strength of the prosecution's case weighs heavily in favor of finding that this error was not harmless beyond a reasonable doubt. Other than the testimony of these two witnesses, the government's case was circumstantial and very weak. In addition, Mr. Nunez Gutierrez suffered extreme prejudice from the prosecutor's closing argument which rested entirely on the testimony of Ms. Vasquez and Ms. Mangosing. Thus, this court should grant certiorari.

II. THE DISTRICT COURT VIOLATED MR. NUNEZ GUTIERREZ'S FIFTH AMENDMENT RIGHT TO A FAIR TRIAL BY RESTRICTING THE DIRECT TESTIMONY OF DEFENSE WITNESSES, THEREBY DENYING HIM AN OPPORTUNITY TO PRESENT HIS THEORY OF THE DEFENSE TO THE JURY

In Washington v. State of Texas at 20, the Supreme Court recognized the importance of a defendant's right to present witnesses to establish a defense:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purposes of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

In the instant case, the defendant was deprived of a fair trial not only by the denial of cross-examination but also by the denial of an opportunity to present his theory of the case to the jury through direct testimony. The court abused its discretion by restricting the direct testimony of Ms Vargas, Celio's ex-girlfriend, whose car was used by Ms. Vasquez to smuggle drugs and Mr. Burke, a Customs Agent who investigated this case.

In addition, the Court abused its discretion by restricting the direct testimony of attorney Carlos L. Juarez. The Ninth Circuit Court of Appeals decision in this case upheld the wholesale exclusion of Carlos Juarez's testimony. Juarez was the attorney whom Nunez had paid to represent Leticia Vasquez. The

opinion notes:

> The district court did not abuse its discretion when it limited Carlos Juarez's testimony. Vasquez testified that Nunez might have paid Juarez, but she was not certain. Nunez-Gutierrez argued that Juarez would have provided testimony to impeach Vasquez. However, Gutierrez did not assert in his proffer to the district court that Juarez would provide relevant impeachment evidence because Nunez-Gutierrez did not say Juarez would testify Vasquez knew Cecilio Nunez paid him. Moreover, Nunez-Gutierrez presented other evidence that Vasquez had a motive to lie to protect Cecilio Nunez by eliciting her admission that Cecilio Nunez was her boyfriend. (p.5)

The memorandum decision misconstrued the basis for the admission of this testimony. Of course, one ground of admissibility is to show that Vasquez lied to the jury when she disclaimed knowledge about whether Cecilio Nunez had provided her with an attorney. The second basis for admissibility was to show bias, that is to show that Vasquez was lying and falsely implicating Mr. Nunez-Gutierrez to protect her boyfriend who, having been involved in the smuggling, then retained counsel for her (the defense would have contended to keep her quiet and deflect suspicion from Cecilio Nunez). Third, the fact that Cecilio Nunez obtained attorneys for the two women involved in the smuggling venture had independent legal relevance. The fact that

Cecilio Nunez paid for attorneys to represent the women involved in the smuggling venture, can be used to establish a nexus between Cecilio Nunez and the underlying criminal activity for which the women were indicted. In United States v. Ricks, 776 F.2d 455 at 465 (5th Cir. 1985), the Court upheld as admissible evidence the following:

> As part of the government's case, it undertook to prove that trial counsel for Ricks had been paid $21,750 in cash by King, Ricks, and Meredith over a four-year period to represent members of their drug distribution network when those members were arrested on narcotics charges. Such proof was highly relevant to the status of Ricks and King as organizers or managers of a criminal enterprise because it would show their payment of fees for underlings who were in trouble.

One is required to ask: If such evidence is admissible when the government seeks to present it, why is it not equally admissible when a defendant seeks to use it to prove his innocence? Does not even-handed justice require the same evidentiary analysis regardless of the identity of the side proffering the evidence?

As a general matter, the identity of the fee payer and the amount of the legal fee are not protected by attorney-client privilege. In re Osterhoudt, 722 F.2d 591 (9th Cir. 1983). Additionally, Rule 3-310 of the State Bar Rules of Professional

Conduct requires that an attorney inform his or her client in writing of the fee arrangement, when their fees are paid by a third party.

Thus, this memorandum decision faulting the offer of proof made by the lawyer as to the proposed testimony is not properly a basis for the affirmance of the conviction in this case, in which the evidence was closely balanced. The credibility of the government's witnesses was questionable and the excluded evidence could have tipped that balance toward acquittal.

The court would not allow the defense to inquire whether Ms. Vargas had spoken with Federal agents in early 1993 regarding Celio's involvement in this case, which was relevant to show that someone other than the defendant committed the charged offenses, and to impeach Ms. Vasquez's testimony.

In addition, the court even threatened to hold defense counsel in contempt of court and send her to M.C.C. because she was asking questions of Ms. Vargas about a discussion between Celio Nunez, Gordo, and herself concerning Mr. Nunez's offer to buy her a car.

Likewise, the court repeatedly restricted the direct testimony of Mr. Burke, specifically testimony which would have impeached the credibility of the government's chief witnesses by showing the inconsistencies in their statements to federal agents

during the investigation and the inconsistencies between the testimony in trial and the facts which were uncovered by the investigation.

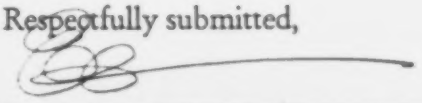
Because the direct testimony of the above witnesses was restricted, the defendant could not present his defense to the jury and was thereby deprived of his right to a fair trial. Mr. Nunez Gutierrez was further prejudiced by the combination of this error and the extreme restriction of the cross-examination of the prosecution's key witnesses. In United States v. Tory, 52 F.3d 207, 211 (9th Cir. 1995), the effect of the admission of evidence error and other errors deprived the defendant of a fair trial and mandated a new trial. Similarly, in the case at bar, each of the errors deprived Mr. Nunez Gutierrez of his right to a fair trial.

CONCLUSION

For the reasons set forth above, petitioner requests that this Court grant his petition for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals, and set the case for briefing and oral argument.

Dated: February 26, 1998

Respectfully submitted,



EUGENE G. IREDALE
Attorney for Petitioner
HIPPOLITO NUNEZ GUTIERREZ

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

~~JAN 29 1997~~ AUG 29 1997

CATHY A. CATTERSON,
CLERK
U.S COURT OF APPEALS

UNITED STATES OF AMERICA,	)	No. 95-50314
	)	
Plaintiff-Appellee,	)	D.C.No.
	)	CR95-293-001-LN
	)	
v.	)	MEMORANDUM*
	)	
HIPPOLITO NUNEZ GUTIERREZ,	)	
	)	
Defendant-Appellant	)	

Appeal from The United States District Court

For the Southern District of California

Leland C. Nielsen, District Judge , Presiding

Argued and Submitted August 5, 1997

Pasadena, California

Before: BROWNING, BRUNETTI , and TROTT, Circuit Judges.

We affirm Hippolito Nunez Gutierrez's Conviction.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

I. SUBPOENAS

We reject Gutierrez's contention that the district court abused its discretion by refusing to issue the subpoenas he requested. To obtain a subpoena under Fed. R. Crim. P. 17(b), a defendant must aver facts which, if true, would be relevant to an issue in the case. United States v. Sims, 637 F.2d 625, 627 (9th Cir. 1980). The district court need not issue subpoenas that seek cumulative testimony. Id. at 629.

Donna Moore's testimony was unnecessary because Gutierrez failed to explain why the frequency with which Mangosing, Vasquez, and Nunez called each other was relevant to any issue in the case.

The district court could not determine the relevance of Mark Comment's or Moses Rodriguez's testimony because Gutierrez did not describe the statements about which they would testify.

Steven Douglas' testimony that officials had charged Nunez with an unrelated drug offense was not evidence that Nunez had the opportunity to commit the crimes at issue in this case or that Vasquez knew at the time of her arrest that Nunez was a drug trafficker.

The district court did not err in refusing to subpoena Raul Ayala. Gutierrez failed to show that Ayala would provide relevant impeachment evidence. Mangosing testified she thought Nunez might have paid Ayala but she was not certain. Gutierrez did not aver that Ayala would testify Mangosing knew Nunez had paid him.

Testimony from Lourdes Pulidio, Carlos Tavison, and the

Internal Revenue Service that Vasquez lied to them would have been cumulative; there was abundant testimony that Vasquez was frequently untruthful.

Gutierrez had no right to call Nunez for the sole purpose of compelling him to invoke his Fifth Amendment privilege before the jury. See United States v. Livacoli, 604 F.2d 613, 624 (9th Cir. 1979). Gutierrez did not request immunity for Nunez, and the government, which was under no obligation to grant immunity, gave no indication it would do so.

II. CROSS-EXAMINATION

A. Vasquez

The district court did not err in limiting Gutierrez's cross-examination regarding the incarcerations of Nunez and David Cardenas. Gutierrez sought to show Vasquez lied about Gutierrez's being the source of the cocaine, but the jury could reach this conclusion only by making the impermissible inference that Nunez and Cardenas acted in conformity with their bad characters and provided the cocaine Vasquez was transporting. See Fed R. Evidence. 404(b). The exclusion of proffered bias or impeachment evidence does not create a Confrontation Clause problem unless it "expose[s] the jury to facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." Delaware v. Van Arsdall, 475 U.S. 673, 680 (quotation omitted).

The testimony was not admissible under United States v. Brady, 561 F.2d 1319 (9th Cir. 1977). In Brady, testimony about a witness' prior heroin deals was admissible to prove the identity of the source of the heroin at issue. Id. At 1320. Prior bad acts are evidence of identity when their similarity tot he crime charged indicates all the acts must be the handiwork of the same person. See 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure §5246, at 512-13 (1978). Gutierrez does not allege that the drug offenses for which Nunez and Cardenas were incarcerated involved a modus operandi that would identify them as the source of the cocaine in this case.

The district court did not err in refusing to allow Gutierrez to elicit testimony that Vasquez had been fired from a bank for stealing. This testimony had limited value as specific-instance evidence of Vasquez's untruthfulness because there was no indication Vasquez lied to perpetrate the theft. See Fed. R. Evidence. 608(b).

The district court did not err in limiting questions about Vasquez's receiving income from illegal sources. Vasquez admitted that she had been paid to transport drugs. Additional testimony on this subject would have been repetitious and only marginally relevant.

B. Mangosing

The district court did not err in limiting questions about Mangosing's hepatitis immunization; Mangosing's drug use was only

marginally relevant.

The district court did not err in limiting Gutierrez's questions about whether Vasquez's family disliked Nunez as being, at best, only marginally relevant.

The district court also properly limited Gutierrez's questions about how many times Vasquez asked Mangosing to accompany her on the South Carolina trip. Gutierrez was able to test Mangosing's ability to recall by asking questions that elicited more relevant testimony.

III. ADMISSION OF EVIDENCE

Gutierrez' cross-examination of Agent Burke created the misimpression that Burke had conducted a shoddy investigation and had been unable to verify Vasquez's claim that a pager number she said she used to contact Gutierrez actually belonged to him. This selective cross-examination opened the door for the government to introduce Gutierrez's address to show that Burke had substantially corroborated Vasquez's statement. See United States v. Beltran-Rios, 878 F.2d 1208, 1212 (9th Cir. 1989); United States v. Segall, 833 F.2d 144, 148 (9th Cir. 1987).

IV. RESTRICTING TESTIMONY OF DEFENSE WITNESSES

The district court did not abuse its discretion when it limited Carlos Juarez's testimony. Vasquez testified that Nunez might have paid Juarez, but she was not certain. Gutierrez argues that Juarez

would have provided testimony to impeach Vasquez. However, Gutierrez did not assert in his proffer to the district court that Juarez would provide relevant impeachment evidence because Gutierrez did not say Juarez would testify Vasquez knew Nunez paid him. Moreover, Gutierrez presented other evidence that Vasquez had a motive to lie to protect Nunez by eliciting her admission that Nunez was her boyfriend.

The district court did not abuse its discretion in limiting Leticia Vargas' testimony that federal agents had asked her questions about Nunez's possible involvement in this case. This testimony was marginally relevant. The fact that federal agents had investigated Nunez's possible involvement did not show he was actually involved.

The district court did not abuse its discretion in limiting Agent Burke's testimony that Vasquez and Mangosing had lied to customs agents. Agent Burke testified they had lied before the district court limited the direct examination. Further testimony to the same effect would have been repetitious.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
DEC 12 1997

CATHY A. CATTERSON,
CLERK
U.S COURT OF APPEALS

UNITED STATES OF AMERICA,	) No. 95-50314
	)
Plaintiff-Appellee,	) D.C.No.
	) CR95-293-001-LN
	)
v.	)
	) ORDER
HIPPOLITO NUNEZ GUTIERREZ,	)
	)
Defendant-Appellant.	)

Before: BROWNING, BRUNETTI , and TROTT, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestions for an en banc rehearing. And no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-50314

CT/AG#: CR95-293-01-LN

FILED
FEB 2 1998

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

/s/ P. Alberda Deputy

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HIPPOLITO NUNEZ-GUTIERREZ,

Defendant-Appellant.

APPEAL FROM the United States District Court for the Southern District of California (San Diego).

THIS CAUSE, came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California (San Diego) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered August 29, 1997.

ENTERED ON 2/4/98

A TRUE COPY
CATHY A CATTERSON
Clerk of Court
ATTEST

JAN 12 1998

By: /s/ Reinaldo Guzman
Deputy Clerk

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal Rule of Evidence, Rule 403 states as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence, Rule 608 states as follows:

> (a) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609 , may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The Fifth Amendment to the United States Constitution states as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

The Sixth Amendment to the United States Constitution states as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.